**SUPERINTENDENT OF PUDU PRISON & ORS.**

**v.**

**SIM KIE CHON**

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 334 OF 1985]
12 FEBRUARY 1986

***CONSTITUTIONAL LAW:*** *Pardons Board - Article 42 of Federal Constitution - Reg. 29 of Essential (Security Cases) Regulations 1975 - Amenability to prerogative orders - Challenge to clemency power - Composition of Pardons Board - Breach of natural justice - Res judicata.*

The respondent who was tried and convicted on a charge under s. 57(1) of the Internal Security Act 1960 and sentenced to death instituted proceedings at the High Court against the first three appellants herein seeking declarations impugning the rejection of his petition for clemency to His Majesty the Yang di-Pertuan Agong. The first three appellants had applied to strike out the second appellant as a party to the proceedings and also to set aside the action as an abuse of the process of the Court. The application was dismissed by the Court and the appellants appealed. Prior to the hearing of the appeal the respondent had successfully obtained an order from the High Court to join the fourth appellant (Pardons Board for Security Offences) as a party to the action.

The respondent's case against the fourth appellant is that it was not properly constituted at the time when it considered the respondent's petition for clemency.

**Held:**

**[1]** The Pardons Board is only an advisory body and makes no decision whatsoever as such but only tenders advice to His Majesty for the purpose of the exercise of his power of clemency under Article 42 of the Federal Constitution.

**[2]** The primary powers of clemency under Article 42 of the Constitution read with reg. 29 of the Essential (Security Cases) Regulations 1975, vest solely in His Majesty the Yang di-Pertuan Agong.

**[3]** The amenability of a prerogative power to judicial review would be dependent on the nature or subject matter of the power. Dictum of Lord Scarman in *Council of Civil Service Unions & Ors. v. Minister for the Civil Service* [1985] 1 AC 374 at page 407 applied.

**[4]** The power of pardon or otherwise to mete out clemency is by Constitution preserved and recognised as an executive power.

**[5]** When the Constitution empowers the nation's highest executive as the repository of the clemency power, the Court cannot intervene and judicial review is excluded by implication. *G. Krishta Goud & J. Bhoomaiah v. State of Andra Pradesh & Ors.* [1976] 3 SCR 73 at page 76, and *Sim Kie Chon v. Superintendent of Pudu Prison and 2 Ors.* [1985] CLJ (Rep) 293 ; applied.

**[6]** The fourth appellant is the appropriate Pardons Board properly constituted under the Essential (Security Cases) Regulations 1975 and was the proper body to advise His Majesty in the instant matter.

**[7]** In the light of Article 150(6) of the Constitution there is no violation of the provisions of Article 42(11) in providing for the Prime Minister to be a member of the fourth appellant instead of the Minister responsible for the Federal Territories of Kuala Lumpur and Labuan.

**[8]** No complaint of breach of natural justice is sustainable as neither the Constitution nor the Criminal Procedure Code stipulates that the fourth appellant should act fairly and observe the requirements of natural justice. *S. Kulasingam & Anor. v. Commissioner of Lands, Federal Territory & Ors.* [1982] CLJ (Rep) 314, and *Payne v. Lord Harris of Greenwich* [1981] 1 WLR 754 considered and applied.

**[9]** The appellants' plea of *res judicata* is well taken and is supported by authority. *Hoystead & Ors. v. Commissioner of Taxation* [1926] AC 155 at pages 165 - 166 applied.

**[10]** There is an inherent jurisdiction of the Court in cases where *res judicata* is not strictly established, and where *estoppel per rem judicatam* has not been sufficiently pleaded or made out, but nevertheless the circumstances are such as to render any re-agitation of the questions formally adjudicated upon a scandal and an abuse, to dismiss the action, stay proceedings, or strike out the defence thereto. *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland* [1979] AC 411 applied.

**[11]** The attempt by way of the instant proceedings to relitigate and re-open the earlier action is a clear instance of an abuse of the process of the Court. *Hunter v. Chief Constable of the West Midlands Police and Ors.* [1982] AC 529 at p. 542 per Lord Diplock applied.

**[12]** The first warrant of execution of sentence lapsed on the stay granted at the instance of the respondent and the second warrant was inevitable and necessary when that stay was lifted.

*[Appeal allowed with costs.]*

**Cases referred to:**
*Horwitz v. Connor [1908] 6 CLR 38*
*Hanratty v. Lord Butler of Saffron Walden [1971] 115 SJ 386*
*Council of Civil Service Unions & Ors. v. Minister for the Civil Service [1985] 1 AC 374*
*de Freitas v. Benny [1976] AC 239*
*Hinds v. The Queen [1977] AC 195*
*G. Krishta Goud & J. Bhoomaiah v. State of Andra Pradesh & Ors. [1976] 2 SCR 73*
*Sim Kie Chon v. Superintendent of Pudu Prison & Ors. [1985] CLJ (Rep) 293*
*S. Kulasingam & Anor. v. Commissioner of Lands, Federal Territory and Ors. [1982] CLJ (Rep) 314*
*Payne v. Lord Harris of Greenwich [1981] 1 WLR 754*
*Hoystead & Ors. v. Commissioner of Taxation [1926] AC 155*
*Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland [1979] AC 411*
*Hunter v. Chief Constable of the West Midlands Police and Ors. [1982] AC 529*

**Legislation referred to:**
Constitution of Trinadad and Tobago, s. 70(1)
Criminal Procedure Code, ss. 281, (c), (d)(ii)
Emergency (Essential Powers) Act 1979, s. 9
Essential (Security Cases) Regulations 1975, reg. 29
Federal Constitution, arts. 5(1), 8, (1), 32(1), 42, (1), (2), (4), (11), 150(6), (6A)
Interpretation and General Clauses Ordinance 1948, s. 28(1)

*For the appellants - T. Selventhiranathan, Senior Federal Counsel; (Mohamad Rauff bin Nabi Box, Senior Federal Counsel, with him)*

*For the respondent - K. Siva Segara; M/s. Siva Segara & Co.*

**JUDGMENT**

**Eusoffe Abdoolcader SCJ:**

Viewed in the context and against the backdrop of previous proceedings instituted by the respondent to the like effect and which have since been disposed of, an appropriate and succinct caption to this present episode in the ineluctably protracted *Sim Kie Chon* sage would be 'a case of new wine in an old bottle'. To exposit this requires a brief descent into the subcellars of its somewhat chequered history.

The respondent was tried and convicted on a charge under s. 57(1) of the Internal Security Act 1960 and sentenced to death by the High Court at Kuala Lumpur on 14 June 1983. His appeal to the Federal Court was dismissed on 26 October 1983, and on his case being referred for clemency to His Majesty the Yang di-Pertuan Agong under s. 281(c) of the Criminal Procedure Code ('the Code') for consideration in accordance with the provisions of Article 42 of the Constitution of Malaysia read with reg. 29 of the Essential (Security Cases) Regulations 1975 ('the Regulations'), the sentence of death was confirmed and ordered to be carried out and an order to this effect was issued by His Majesty on 20 April 1985. Pursuant thereto a warrant was issued setting the date for execution as 3 July 1985. The respondent then commenced an action on 2 July 1985 against the first and third appellants and the Pardons Boards, Malaysia instead of the second appellant for declarations impugning the rejection of clemency on the ground of discrimination in breach of article 8 of the Constitution. Harun Hashim J granted a stay of execution of the sentence on that very day but this was later lifted and the action struck out on an application by the defendants thereto. An application for a stay and an appeal against that decision were heard together and dismissed by the Supreme Court on 23 July 1985.

We pause to observe that the respondent had also previously applied to the High Court at Kuala Lumpur to adduce for the purposes of a petition for clemency further evidence and submissions in respect of his conviction in the substantive criminal proceedings in which he was convicted and sentenced to death. This was refused as it was virtually an attempt to re-open his conviction; an appeal to the Supreme Court was lodged but later abandoned. A fresh warrant of execution now fixed the date of execution for 15 August 1985.

The respondent then instituted the present suit against the first three appellants on 13 August 1985. His application for a stay of execution of the sentence was refused but the Yang di-Pertuan Agong in the exercise of the powers of clemency vested in him granted a respite pending the final disposal of these proceedings. The first three appellants applied to strike out the second appellant as a party and to set aside this action as an abuse of the process of the Court. Harun Hashim J dismissed this application on 17 October 1985 without, regrettably, giving any reasons or grounds for his decision but we are given to understand from the Bar that he indicated at the hearing that he thought there were triable issues. The appellants appealed and about ten days before the hearing of this appeal the respondent obtained an order from the learned Judge to join the fourth appellant as a party to this action and to amend the writ and statement of claim.

At the outset of the hearing of this appeal we acceded to a motion on behalf of the respondent to include the amended writ and statement of claim in the record of appeal. On the basis of his amended pleading the relief the respondent seeks is, briefly, for declarations to the effect that the fourth appellant which considered the respondent's case was not lawfully constituted, that the second appellant was the proper body for this purpose, that

the decision of the Pardons Board dated the 20 April 1985 was void and legally ineffective, that the warrant or warrants of execution of sentence of death were equally void and of no effect and that the Pardons Board had acted unfairly and in breach of the rules of natural justice and of the provisions of Articles 42, 5(1) and 8(1) of the Constitution, and for a stay of execution pending the final disposal of the imminent proceedings. We must immediately state that the substratum of the case advanced for the respondent rests on a twice compounded fallacy, scilicet, in seeking to implead what he purports to refer to as the decision of the Pardons Board and in doing so indirectly professing to impugn the decision and order of the Yang di-Pertuan Agong in the matter. The Pardons Board is only an advisory body and makes no decision whatsoever as such but only tenders advice to His Majesty for the purpose of the exercise of his powers of clemency under Article 42 of the Constitution. Mr. Siva Segara for the respondent had perforce to concede this when we put it to him but says this was only an unfortunate use of the word 'decision'. We think it is very much more than unfortunate in that this goes to the very basis of the respondent's claim. Mr. Siva Segara had once again to agree, when we pointed this out to him, that the primary powers of clemency are, for the purposes of this appeal, vested solely in His Majesty under the substantive cls. (1) and (2) of Article 42 of the Constitution (read in the light of the Regulations) empowering him to make the requisite decision in the circumstances of any particular case and the mode of the exercise of those powers and the reference to the advice and constitution of a Pardons Board specified in Clause (4) *et sequitur* of Article 42 in fact provide the machinery for the functional implementation thereof.

The respondent by these proceedings is in our view in effect attempting to circuitously challenge the exercise by His Majesty of his powers of clemency in this case under Article 42 of the Constitution which he is expressly precluded from doing by virtue of the provisions of Article 32(1) of the Constitution which stipulate that His Majesty shall not be liable to any proceedings whatsoever in any Court. The High Court of Australia in *Horwitz v. Connor* [1908] 6 CLR 38 held (at page 40) that no Court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy, and a similar attitude toward the royal prerogative of mercy was adopted by the English Court of Appeal in *Hanratty v. Lord Butler of Saffron Walden* [1971] 115 SJ 386; The Times, 13th May, 1971 p. 11. In relation to the question of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would be dependent on its nature or subject matter, and we find support for this view in the decision of the House of Lords in *Council of Civil Service Unions & Ors. v. Minister for the Civil Service* [1985] 1 AC 374 where Lord Scarman in his speech (at page 407) says that it can be said with confidence the exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say if it is a matter upon which the Court can adjudicate, and again in the speech of Lord Roskill (at p. 418) where he refers to examples of prerogative powers which he did not think could properly be made the subject of judicial review, such as *inter alia* that relating to the prerogative of mercy, because their nature and subject matter are such as not to be amenable to the judicial process.

In *de Freitas v. Benny* [1976] AC 239 Lord Diplock, who delivered the report of the Privy Council, in dealing with the power of clemency laid down in s. 70(1) of the Constitution of Trinidad and Tobago said (at p. 247):

> Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion.

Mercy is not the subject of legal rights. It begins where legal rights end.

We would add that Lord Diplock also said (at p. 248) that a convicted criminal was not entitled to have disclosed to him any material furnished to the Minister and the Advisory Committee when they are exercising their respective functions under the relevant constitutional provisions in advising the Governor-General in regard to the exercise of the powers of clemency. Article 42 of our Constitution is a reiteration of the prerogative power of mercy exercisable on the advice of the appropriate Pardons Board. The power of pardon or otherwise to mete out clemency is an executive power, and in our Constitution the royal prerogative of mercy is expressly preserved by Article 42 of the Constitution and is recognised by its inclusion in Chapter 3 of Part IV thereof as an executive power. (cf. *Hinds v. The Queen* [1977] Ac 195 (at page 228)). The Supreme Court of India has also held in *G. Krishta Goud & J. Bhoomaiah v. State of Andra Pradesh & Ors.* [1976] 2 SCR 73 (at page 76) that when the Constitution has empowered the nation's highest executive as the repository of the clemency power, the Court cannot intervene and judicial review is excluded by implication. The principle underlying these cases is incisively ingeminated in the judgment of this Court in *Sim Kie Chon v. Superintendent of Pudu Prison and 2 Ors.* [1985] CLJ (Rep) 293 ; which effectively disposed of the earlier action commenced by the respondent.

The respondent takes the point in these proceedings that the fourth appellant which is a creature of reg. 29 of the Regulations was not lawfully constituted and he seeks to impugn the validity of this regulation on the basis that the amendment effected thereto in 1981 could not be lawfully enacted in view of the provisions of the Emergency (Essential Powers) Act 1979. This argument is in our view wholly bereft of any substance or merit whatsoever, and if an answer is required it is to be found in s. 9 of that Act. The fourth respondent is the appropriate Pardons Board properly constituted under the Regulations and was the proper body in the instant matter for the purposes of advising His Majesty under Article 42 of the Constitution read with reg. 29 of the Regulations, and there is no violation of the provisions of Article 42(11) in providing for the Prime Minister to be a member thereof instead of the Minister responsible for the Federal Territories of Kuala Lumpur and Labuan in the light of Article 150(6) of the Constitution which validates any provision of a statute (judicially construed and settled to include regulations made thereunder) passed during an emergency which are inconsistent with any provision of the Constitution but subject to the exceptions specified in Clause (6A) of Article 150. It is abundantly clear that the purport and effect of reg. 29 of the Regulations is that it is to modify the provisions of Clause (11) of Article 42 of the Constitution in relation to security cases within the connotation thereof in the Regulations.

The respondent also complains that the fourth appellant failed to act fairly and observe the requirements of natural justice in that it should not take into consideration any evidence brought before it which was adverse to the respondent without giving him a chance to refute it, that he was not given an opportunity to be present in person or by Counsel at the hearing before the Pardons Board nor was he supplied with the documents referred to in s. 281 of the Code and its decision was not communicated to him in time or at all. We need only say on this aspect that there are no requirements to the effect contended in the Constitution or the Code, and we would refer in relation to this to the judgment of the Federal Court in *S. Kulasingam & Anor. v. Commissioner of Lands, Federal Territory and Ors.* [1982] CLJ (Rep) 314 (at pages 210 - 211). The English Court of Appeal has held in *Payne v. Lord Harris of Greenwich* [1981] 1 WLR 754 that the scope of the duty to act fairly imposed by the rules of natural justice depends upon the subject matter and circumstances of each case and there was accordingly no obligation for the disclosure to a prisoner of reasons for the refusal of

his release on parole, and we would once again refer in this connection to the speech of Lord Diplock *in de Freitas v. Benny (supra)* (at p. 248) which we have earlier adverted to. If any Court were to accede to the contention advanced on behalf of the respondent on the lines indicated then it would in effect be countenancing the respondent's participation in the exercise of an executive and prerogative power and virtually reactivating a concluded trial. It follows sequentially that if it is open to a Court to examine the advice of the Pardons Board there would then in effect be an extra-curial retrial and endless reventilation of every convict's case. The respondent further raises the point of unfairness and prejudice by reason of the fact that the Attorney General who was the Public Prosecutor in the main trial of the respondent or his delegate participated as a member of the fourth appellant. This question is unarguable in view of the specific constitutional requirement to this effect in Article 42(5) and (9) of the Constitution (*S. Kulasingam* (*supra*)) at page 211), and no complaint of breach of natural justice is accordingly sustainable in this respect.

The earlier action instituted by the respondent on 2 July 1985 and which was struck out sought relief on the ground of discrimination in breach of Article 8 of the Constitution but in the present proceedings the grounds for relief have been augmented and declarations sought to the effect we have indicated earlier. The appellants plead *res judicata* in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hoystead & Ors. v. Commissioner of Taxation* [1926] AC 155 (at pp. 165 - 166) and a catenation of cases to the like effect, namely, that the plea of *res judicata* applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

There is moreover the inherent jurisdiction of the Court in cases where *res judicata* is not strictly established, and where *estoppel per rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the Court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland* [1979] AC 411 (at p. 425):

> The second defence is one of '*res judicata*'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] Ac 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
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> > ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings'. (p. 590).

The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to

this judgment and would appear to us to be as clear an instance of an abuse of the process of the Court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police and Ors.* [1982] AC 529 (at page 542).

The respondent also takes issue on the fact that there were two warrants of execution of sentence under s. 281 of the Code and that a third may yet be issued and that this is unlawful as there cannot be two or more concurrent or consecutive warrants. This argument is wholly devoid of merit as the first warrant of execution of sentence lapsed the day before the date set for execution on the stay granted at the instance of the respondent in the first action instituted by him and so a second one was inevitable and necessary when that stay was lifted and those proceedings dismissed. This matter is in fact envisaged and provided for in s. 281(d)(ii) of the Code, and in any event s. 28(1) of the Interpretation and General Clauses Ordinance 1948 specifically provides that a power conferred or a duty imposed by a written law may be exercised or performed from time to time as occasion requires.

In the premises and for the reasons discussed we find that the instant action under consideration in this appeal is wholly unmeritorious and clearly an abuse of the process of the Court. We would only add by way of peroration that to approbate and sustain the *modus operandi* resorted to by the respondent, spurred on perchance by the demon of eternal hope, would not only be countenancing an abuse of process by interminable litigation in the pattern of circular tail-chasing with no forward movement but might well in the process culminate in the transmutation of the sentence of death by hanging to one of death by old age or the passage of time with perhaps attendant ancillary complications of anxiety and frustration as well for the prisoner himself along the line!

We accordingly at the conclusion of argument allowed this appeal with costs here and below to the appellants, set aside the order of the learned Judge and struck out the action instituted by the respondent.

Also found at [1986] 1 CLJ 548